

secondary strikes: when are they permissible?

by penny bosman

The recent public service strike has brought the issue of secondary or "sympathy" strikes into focus with COSATU calling on its affiliated unions to encourage their members to engage in industrial action in support of the demands being made by public sector unions.

While these strikes largely did not materialise despite COSATU's threats, the potential consequences of such strikes would be far reaching and affect industries as diverse as mining and manufacturing – industries apparently unrelated to government and the demands being made by public sector employees.

Were such threats justified? Could employees in, for instance, the manufacturing industry have engaged in a lawful secondary strike?

In this article we look at the requirements for lawful secondary strikes in terms of the Labour Relations Act.

What is a secondary strike?

In simple terms, a secondary strike is a strike by employees against their employer in circumstances where they do not have a grievance or a dispute with their own employer ("the secondary employer"), but are engaging in a strike in order to advance the cause of other employees against their employer ("the primary employer").

Secondary strikes are therefore often referred to as "sympathy strikes" because employees who engage in them do so in order to demonstrate sympathy for the demands of other employees.

What are the requirements for a secondary strike?

In order for employees to engage in a lawful secondary strike:

- the strike that is to be supported must be a protected strike;
- the secondary strikers must give the employer at least 7 days' written notice of the start of the proposed secondary strike; and
- the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

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The approach of the Labour Court

While the first two requirements are fairly straightforward, the interpretation of the third requirement has been much debated.

In the example of the public service strike where, for instance, a secondary strike takes place in the mining industry, can it be said that the nature and effect of the secondary strike is reasonable in relation to the effect it will have on

government in dealing with its wage negotiations with public sector employees?

Is the reasonableness (or otherwise) of a secondary strike only to be judged in relation to the effect it is likely to have on the business of the primary employer or must there be a degree of proportionality between the effect that it is likely to have on the primary employer when judged against the disruption that it is likely to cause the secondary employer?

The Labour Court has formulated a two-stage approach to be followed in dealing with the third requirement:

- Would the secondary strike have an impact on the business of the primary employer? and if so
- Would the nature and extent of the secondary strike be reasonable in relation to its effect on the primary employer's business?

Stage 1: The link between the secondary employer and the primary employer

The Labour Court has held that there must be a sufficient link between the secondary employer and the primary employer that would cause the secondary strike to influence collective bargaining between the primary employer and its employees.

In practice, the question of whether a sufficient link exists is a value judgement that the Labour Court must make in the circumstances of each case.

Some examples of situations where a sufficient link was found are where the secondary employer was a supplier, customer, labour broker or subsidiary of the primary employer.

In other cases, where the secondary employer was simply a shareholder or part of the same trading group, a sufficient link was not found.

Whether or not a sufficient link exists may not be apparent at first glance.

While the raft of threatened secondary strikes in the private sector appeared, on the surface, to be completely unrelated to the public service strike, a sufficient link could arguably exist in that should large private sector employers, who contribute extensively to the revenue of the State, be faced with crippling secondary strikes, they would inevitably be forced to exert pressure on government to resolve the public service strike.

A degree of economic pressure would also arguably be exercised in such circumstances.

Could all employers potentially be faced with secondary strikes on this basis? This proposition has not yet been tested by the Labour Court.

What remains clear, however, is that where no link can be shown to exist between the primary and the secondary employer, that is the end of the matter and there is no need to consider the reasonableness or otherwise of a secondary strike as the first step in the process of evaluating compliance with the third requirement set out above has not been met.

Step 2: The reasonableness of the secondary strike

Once a link is found to exist between the primary and secondary employers, the second question that must be considered is the reasonableness of the secondary strike in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

The question of reasonableness was considered in the controversial case of **Billiton Aluminium SA Ltd v NUMSA [2002] 1 BLLR 38 (LC)** in which the Labour Court held that the damage that a secondary employer may suffer as a result of a secondary strike (which in the **Billiton** case was potentially billions of rands) was not an appropriate criterion

for determining the reasonableness of the secondary strike as this would place unacceptable limits on the right to strike and would allow the Labour Court to involve itself in power play between employers and employees.

In light of the **Billiton** judgement, therefore, the potentially extensive prejudice that a secondary employer may suffer as a result of a secondary strike is not relevant and the focus is exclusively on the effect or the possible effect of the secondary strike on the business of the primary employer.

A secondary strike must be reasonable when measured against the direct or indirect effect that it may have on the business of the primary employer and the effect that it is likely to have on the balance of power between the primary employer and its employees.

The **Billiton** judgment has been extensively criticised by those who believe that the impact of the secondary strike on the secondary employer must be assessed as a factor in determining the reasonableness of a secondary strike.

This is because a comparison must be made between the effect of the secondary strike on the secondary employer and the possible direct or indirect effects that the secondary strike may have on the primary employer.

Critics point out that even if a link exists between the primary and secondary employers, the secondary employer may in fact be powerless to bring any influence to bear on the primary employer.

In addition, the secondary strike may spread further and ultimately bringing the entire economy to a standstill, which could not have been the intention of the legislature when drafting the provisions of the LRA dealing with secondary strikes.

The views of **Billiton** critics would appear to have found resonance with the Labour Court in the recent case of **South African Local Government Association v South African Municipal Workers Union**, which involved an application to interdict a proposed secondary strike by the South African Municipal Workers Union ("SAMWU") in support of the public service strike.

In refusing the application, the judge criticised the **Billiton** judgement and found that in assessing the reasonableness of the proposed strike, two factors were relevant, namely the reasonableness of the nature and extent of the secondary strike and (separately) the effect of the secondary strike on the primary employer.

(We have summarised the judge's comments in giving the order, as there is as yet no judgment on the case).

In relation to the first factor, the Court found that the secondary strike that SAMWU proposed to embark on was limited to a day and would not involve essential services employees.

While the strike would cause disruption and inconvenience to third parties, this was not a decisive factor and, accordingly, the nature and extent of the secondary strike was found to be reasonable.

In relation to the second factor, the Court considered the direct and indirect effect of the secondary strike on the primary employer, namely the State, and found that the secondary strike would affect the economic power of the State given that under the system of co-operative governance which exists in South Africa, the withdrawal of municipal services would undoubtedly have a direct and indirect effect on the State.

Where to from here?

Secondary strikes undoubtedly play an important role in current labour relations and collective bargaining, however, they must meet the requirements of the LRA.

Most importantly, there must be a link between the primary and secondary employers and the secondary strike must be reasonable.

The changing views of the Labour Court in relation to the concept of reasonableness when it comes to secondary strikes will no doubt be welcomed by employers who can ill-afford the costs and disruption occasioned by secondary strikes, particularly when engaging in their own wage negotiations.

pre-employment polygraph testing: can you do it?

by nicky van der westhuizen

Can an employer require applicants for employment to submit to polygraph testing at the pre-employment stage?

While there is no law expressly prohibiting employers from requiring applicants to undergo polygraph testing, the Employment Equity Act and its provisions need to be taken into account.

We are of the view that polygraph testing does not fall within the realm of section 8 of the EEA (i.e. it is not sufficiently similar to psychological or psychometric testing) and is therefore not subject to the restrictions of this section; however, the individual rights of an employee to privacy, dignity and equality must be considered and balanced against the employer's right to protect its property and economic activity.

Consent to testing

Where an applicant for employment voluntarily consents to undergo a polygraph test, this consent will prevent the applicant from later claiming that any of the rights mentioned above have been violated.

Accordingly, it is recommended that employers arrange for applicants to sign consent forms prior to undergoing a polygraph test.

The applicant should be informed of the following:

- The nature and purpose of the test;
- The rights of the both parties in respect of the test (specifically including that it is voluntary); and
- The implications the results of the test would have for the parties.

If, after being informed, the applicant is prepared to voluntarily submit to the polygraph test, then s/he should be asked to sign a consent form acknowledging that s/he is voluntarily submitting to the test.

If the employee then alleges at a later stage that the test was not voluntary,

the employer will be able to refute these allegations.

Remember also that only qualified and registered polygraph examiners should be used.

“the individual rights of an employee to privacy, dignity and equality must be considered and balanced against the employer’s right to protect its property”

What questions should the employer ask?

In most cases, the main purpose of administering a polygraph test is to allow the employer an opportunity to root out any dishonest applicants in order to protect its business interests. In order to ensure that the testing that is carried out is fair, we recommend that the polygraph test should be largely standardised by the same or similar questions being put to all applicants for employment.

The questions must be directly related to the purpose for which the test is being administered i.e. to detect dishonesty and/or any integrity issues.

Questions that could be put to applicants include the following:

- Have you ever been disciplined for any conduct related to dishonesty in your previous employment?
- Have you ever been involved in any criminal offence involving any element of dishonesty?
- Have you been completely truthful in answering the questions in your application form?

Can an employer compel an applicant for employment to submit to a polygraph test?

There is no doubt (and as has been held by our Courts) that an employer cannot force an employee to submit to a polygraph test.

All polygraph testing must be voluntary. It follows that an employer cannot force an applicant for employment to submit to a polygraph test if an applicant has refused to do so voluntarily.

While it has been held that employers cannot draw negative inferences from an employee's refusal to undergo a polygraph test, in our view the same cannot be said of applicants for employment.

An applicant's refusal to undergo a polygraph test at the pre-employment stage would, in our view, be a sufficient reason on its own for an employer not to offer an applicant employment, although it would of course be beneficial if there were further reasons for doing so other than the refusal to undergo the test.

Where an applicant for employment has been denied employment on the basis that he refused to undergo a polygraph test, the only recourse open to an aggrieved applicant would be to lodge a claim of unfair discrimination, since the prohibition against unfair discrimination in terms of the EEA extends to applicants for employment.

Requirements for an unfair discrimination claim

Where an individual claims to have suffered a disadvantage that s/he alleges is discriminatory, the disadvantage only becomes unfair where there is no objective justification for the manner in which an individual is treated (i.e. the distinction made is then arbitrary).

An employer cannot differentiate arbitrarily and such differentiation must be justified when measured against the requirements of the job or the operational requirements of the business.

It will accordingly be necessary for an employer to fully justify the requirement for pre-employment polygraph testing.

While the increasing levels of dishonesty, fraud and corruption in the workplace go a long way towards justifying this, there will be further requirements specific to the employer that should be shown.

For example, a diamond dealer will clearly require the highest integrity and levels of trust and honesty given the huge value of the product with which employees are dealing and the temptation to steal, while for example a gardening services company, where the employees are under constant supervision and the employees are not exposed to any valuable goods, may have less justifiable reasons for requiring pre-employment polygraph screening.

“an employer can refuse to employ an applicant if s/he has failed the polygraph test at the pre-employment stage, provided the employer has justifiable reasons for requiring the pre-employment polygraph test in the first place and can accordingly defend any claim of alleged unfair discrimination”

Where an employer can fully justify the requirement for pre-employment polygraph testing, we are of the view that if an applicant is not employed because of the refusal, such an applicant will have great difficulty in bringing an unfair discrimination claim, particularly as the applicant in all probability will not be able to successfully claim that his dignity (which is an important requirement when assessing discrimination) has been negatively impacted.

Where an applicant for employment has a valid reason for refusing to undergo the polygraph test, such as a religious reason, a refusal to employ the applicant solely on the basis of the refusal to submit to the test would in all likelihood constitute unfair discrimination based on the applicant's religious beliefs.

What happens when an applicant fails the polygraph test?

In general terms, where an employee fails a polygraph test, this in itself is not conclusive and may only serve as corroborative evidence.

However, in our view, the position is different at the pre-employment stage.

Where the test has been administered correctly and the results are properly considered based on the questions and circumstances surrounding the test, an employer can refuse to employ an applicant if s/he has failed the polygraph test at the pre-employment stage, provided the employer has justifiable reasons for requiring the pre-employment polygraph test in the first

place and can accordingly defend any claim of alleged unfair discrimination.

Lessons for employers

In the event that an employer decides to implement a system of requiring applicants for employment to submit to polygraph testing, an employer must ensure that all applicants are required to submit to the testing.

If it is applied selectively, applicants may have a claim for unfair discrimination.

In addition, valid non-discriminatory questions must be asked during the polygraph test.

By implementing a policy of polygraph testing during the important pre-employment stage, employers may well be weeding out any potential dishonest employees before they even set foot on the employer's premises.

This is a proactive and preventative measure which should be seriously considered by all employers, especially those operating in the retail industry or in other industries where theft and/or stock loss in the workplace is high.

At the same time, it should be remembered that many potential employees may find such a requirement to be overly-invasive and it may lessen an employer's attractiveness as an employer.

This should all be balanced out to implement the appropriate measure in each workplace.



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volunteer workers: a risk to employers?

by susan stelzner and chola makgamathe

In the recent case of *ER24 Holdings v Smith NO*, the Supreme Court of Appeal was called upon to consider the position of a volunteer worker who was seriously injured in an accident that occurred whilst she was travelling as a passenger in a vehicle driven by an employee of ER24, Ms Natasha Swanepoel.

ER24 operates an emergency service. Ms Staracek, the volunteer worker, sued ER24 for damages in excess of R7m. She had been undergoing vocational experience that was essential to enable her to qualify as a paramedic and was not paid for her services.

She and Ms Swanepoel were on their way to an accident scene when the accident in which Ms Staracek was injured occurred. The accident was caused by the negligence of Ms Swanepoel who was acting within the course and scope of her employment as the shift leader at the time.

ER24 denied liability on two grounds.

1. Firstly, it said that Ms Staracek was an employee as defined in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), that the damages claimed by her were in respect of an occupational injury and that in terms of Section 35 of COIDA no action lay against it for the recovery of damages claimed. Section 35(1) of COIDA stipulates that "*no action shall lie by an employee for the recovery of damages in respect of any occupational injury resulting in the disablement of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement*".
2. Secondly, it argued that it had concluded a contract with Ms Staracek in terms of which its liability for the injuries suffered by her were excluded. Alternatively, that the contract should be rectified so as to exclude such liability.

What did the SCA decide?

The SCA first looked at the definition of "employee" in COIDA, which is as follows: "*Employee means a person who has entered into or works under a contract of service or apprenticeship or learnership, with an employer, whether the contract is expressed or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind...*".

ER24 argued that although Ms Staracek was not paid, it remunerated her in kind by allowing her to travel in its vehicles, to be exposed to actual accident scenes and to obtain vocational guidance and experience from its more experienced personnel all with the view to enabling her to gain the necessary experience to qualify as a paramedic.

The SCA disagreed with this argument and stated that remuneration in kind means the provision of something that has an objectively ascertainable value. The court concluded that Ms Staracek was not remunerated whether in cash or in kind and she was therefore not an employee for the purposes of COIDA. This meant that she could claim damages from ER24.

ER24's second argument was that it had contracted out of liability to Ms Staracek. It based this argument on a clause in a contract which Ms Staracek had signed which read as follows: "*(Ms Staracek) indemnifies ER24 of any claim in respect of any laws, damage or injury howsoever caused which may be sustained during the course of assisting with the operational requirements of the Company*".

The clause was ambiguous as it did not make it clear whether Ms Staracek indemnified ER24 for injuries which might be caused to a third party or to herself. Only on the latter interpretation could the clause provide a defence to ER24.

The Court said that the clause could, however, easily be interpreted so as to mean that it covered injuries to third parties. In fact, that was a more likely

interpretation. The court thought that it should be wary of contractual exclusions, since they deprive parties of rights that they would otherwise have had at common law. The very fact that an exemption clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application.

This requires a consideration of the background circumstances and a resort to surrounding circumstances if there be any doubt as to the application of the exclusion. The court was also not prepared to rectify the exclusion clause so as to exclude any liability on ER24's part to Ms Staracek.

The Court confirmed the principle that a party relying on rectification has to show that the contract as rectified reflects the common continuing intention of the parties thereto.

Although ER24 gave evidence as to what it meant by the clause, there was no evidence from which Ms Staracek's intention could legitimately be inferred.

Lessons for employers

- In the light of this case, employers should be careful when engaging the services of volunteer workers. An accident involving a volunteer worker could expose the employer to a claim for damages unless the worker is remunerated on the basis of something that has a readily ascertainable value. If a volunteer worker is not covered by COIDA, an employer may wish to put some other form of insurance in place against the risk of a damages claim.
- Where employers wish to contract out of liability that could arise at common law, the employer must ensure that the extent of the exclusion of liability is clearly and plainly spelt out in the contract.

deductions from pension benefits to pay employers

by stuart harrison

Employers often seek to prevent pension benefits being paid out to delinquent employees against whom the employer wishes to recover losses suffered by it as a result of the employee's misconduct, based on the provisions of Section 37D of the Pension Funds Act.

Recent cases show that the question is open as to whether the misconduct contemplated in Section 37D must involve an element of dishonesty for the section to be applicable.

A case where the employer succeeded (despite strenuous opposition) in preventing the pension benefits of dismissed employees being paid out is the matter of *Msunduzi v Natal Joint Municipal Pension / Provident Fund & Others* [2006] 3 BPLR 210 (N).

The employer had dismissed three employees for their direct involvement in the misappropriation of market funds at the municipal market and a fourth employee, who was the manager of the market and in charge of the financial and administrative components of the market, for having done very little or nothing by way of the discharge of his fiduciary duties towards the municipality as his employer, once he became aware of the misappropriation of the market funds.

The employer contended that its losses were at least in the region of R850 000 but could possibly be up to approximately R2.3 million, as a result of the misconduct of the former employees.

It sought an interdict preventing the pension/provident fund from paying out any pension benefits to the former employees pending the determination of an action to be instituted by the employer in court for the losses suffered as a result of the misconduct.

The municipality's application was opposed by the former employees who, amongst other things, took a range of legal technical points in an attempt to defeat the application, most of which were rejected by the Court.

As regards the merits of the application, the Court was satisfied that the municipality had established a prima facie right to recover the monies which it alleged were misappropriated (three of the employees had previously admitted to at least unauthorized borrowing and a cover up in relation thereto).

“it is clear from the differing views expressed in the two High Court cases that the last word has not been heard regarding whether or not dishonesty is a necessary element of the misconduct referred to in section 37D in order for section 37D to be available to employers”

In addition to showing a prima facie right to recover damages, however, the municipality also had to show that it had a prima facie right to rely on the provisions of Section 37D, which allows for the deduction from pension benefits in certain circumstances in respect of damages caused to an employer by reason of theft, dishonesty, fraud or misconduct by an employee who was a member of the fund and where he or she has admitted liability to the employer in writing or a judgment has been obtained by the employer in this regard.

The Court rejected the contention by the former employees that Section 37D only applied to pension funds where the

employer made contributions to the fund (in this case, the full contribution to the fund comprised an employee contribution) and confirmed that all that was required was that the employer participate in and not necessarily contribute to the fund.

The former employee who had been the manager of the municipal market also contended that at best for the municipality, he was guilty only of gross negligence and not misconduct that had an element of dishonesty and, based on earlier authority emanating from the Durban High Court to the effect that the misconduct referred to in Section 37D must have an element of dishonesty in it in order to qualify for purposes of the section (see *Moodley v Scottburgh / Umzinto North Local Transitional Council* 2000 (4) SA 524 (D)), he argued that Section 37D did not apply to him and therefore that no prima facie right had been established by the municipality.

The High Court in this matter indicated that it was by no means convinced that the previous decision of the Durban High Court in this regard was correct and the Court was in fact doubtful that dishonesty had to be an element of the misconduct referred to Section 37D.

Ultimately, however, it found that it was unnecessary for it to decide this issue because it was satisfied that, on the facts, the former manager's conduct had facilitated a fraudulent scheme and that his conduct revealed at least an element of dishonesty.

The Court was accordingly satisfied that the municipality had established a prima facie right to the relief sought and, after having considered the other relevant factors, concluded that the interdict should be granted.

In this regard, it weighed with the Court that the action by the municipality for the recovery of its damages had already progressed to the stage where pleadings had closed and a trial date was simply being awaited, with the result that the prejudice to the former employees in having to wait for their pension payouts was to be relatively short lived if they were innocent.

In the matter of *Meyer v Provincial Department of Health and Welfare and Other* [2007] 1 BPLR 108 (T), the

employer did not experience the same success.

The employee in that matter had resigned in the face of disciplinary proceedings instituted against him in relation to allegations that he had exceeded his allocated authority in ordering certain products for his employer, which conduct was consequently in breach of the employer's tender processes.

The Court pointed out that the misconduct upon which the employer relied did not have dishonesty as an element to it and, based on the authority of the case, found that in the circumstances Section 37D did not have application.

There was also no evidence of the employer having instituted the necessary legal proceedings towards the recovery of damages as a result of the employees' alleged misconduct.

The Court accordingly directed that the fund in question process the former employee's pension benefits without delay.

The key issue for employers

It is clear from the differing views expressed in the two High Court cases that the last word has not been heard regarding whether or not dishonesty is a necessary element of the misconduct

referred to in Section 37D in order for Section 37D to be available to employers.

For practical purposes, employers seeking to rely on Section 37D should, where possible, ensure that they do so in circumstances where the misconduct of the former employee involves an element of dishonesty.

However, it is still open to argue that pension monies should be withheld even if the misconduct relied on does not involve dishonesty.

The argument might succeed if the comments by the Court in the *Msunduzi* case are followed.

renewing fixed term contracts - employers should be careful

by thabang ntshebe

Section 186(1)(b) of the Labour Relations Act defines dismissal as including a situation where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it.

In order to protect themselves against section 186(1)(b) of the Act, employers frequently in their fixed term employment contracts include a clause stating that the contract does not give rise to any expectation of renewal.

However, sometimes business reality dictates that it is necessary for the employer to renew the contract on a number of occasions, each time using the same clause that says the contract does not give rise to an expectation that it will be renewed.

The crucial question is when does the failure to renew the contract amount to unfair dismissal as defined in 186(1)(b) and what is the effectiveness of the clause that there is no expectation of renewal?

The recent case of *Yebe / University of KwaZulu-Natal (Durban)* [2007] 1 BALR 77 (CCMA) considered the above issues.

“the crucial question is when does the failure to renew the contract amount to unfair dismissal as defined in 186(1)(b)”

The employee had been a residence administrator on a fixed term contract of employment which had been renewed for not less than 20 times over a four year period before the University decided not to renew it.

The arbitrator concluded that the University's failure to renew the contract amounted to dismissal as defined in section 186 and that the dismissal was unfair.

In coming to this conclusion, the arbitrator noted, amongst other things, the pattern of renewals which created an expectation that further renewals for fixed term periods could be expected.

The University's conduct created the impression that renewal was simply a formality.

Another important consideration for the arbitrator was that there was still a need for the employee's services as there were several residences within the University and therefore the work he doing was necessary. The employee was awarded compensation.

Even though there are no legal limitations as to how many times a contract can be renewed before it will constitute unfair dismissal when it is not renewed, employers should, depending on the specific purpose of the contract and the circumstances, try to avoid repeated renewals.

Employers will not necessarily be able to rely on a clause that says the contract does not give rise to an expectation of renewal.

It will be important for employers, if and when renewing the contract, to explain to the employee the reasons for the renewal of the contract, even though it was initially for a fixed period, so that the employee knows exactly why his contract is being renewed.

That may, to some extent, assist in defending a claim of unfair dismissal based on section 186(1)(b) of the Act.

What may seem fair and reasonable from a business perspective may be unfair to the employee and may be found to be unfair by an arbitrator.

the national credit act and loans to employees

by stuart harrison and professor dale hutchison

An important issue for employers has arisen in light of the new National Credit Act 34 of 2005 (NCA), which recently came into operation. The issue is whether staff loans or credit agreements concluded between employers and their employees fall within the purview of the NCA. There has already been debate on the subject and some legal advisors have expressed the view that staff loans do fall under the NCA. We understand that the Regulator has informally expressed the view that staff loans are covered by the NCA. However, we have looked at the issue carefully and have come to the conclusion that staff loans would generally not be covered by the NCA. A brief summary of our reasons for this view is set out below.

- The NCA applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic of South Africa. An agreement will not be one between parties dealing at arm's length if each party is not independent of the other and consequently does not strive to obtain

the utmost possible advantage out of the transaction. In our view, a credit arrangement made in an employer / employee relationship does not involve independent parties.

- An agreement will also not be between parties dealing at arm's length if it is of a type that has been held in law to be between parties who are not dealing at arm's length. While we are not aware of any binding authority that expressly declares agreements concluded between employers and employees to be between parties who are not dealing at arm's length, this conclusion is almost inevitable in light of various developments in our law, including the fact that the relationship between the parties in an employment relationship is one that attracts fiduciary duties – in our view this must inevitably lead to the conclusion that the parties are not dealing at arm's length.
- By enacting legislation that severely erodes freedom of contract in the

interest of employees, because of their generally weaker bargaining position, the legislature has implicitly, if not explicitly, recognised that negotiations between individual employers and employees are not dealings between parties at arm's length. The law relating to the enforcement of agreements in restraint of trade affords further evidence that the courts treat agreements concluded between employers and employees on a different footing to agreements concluded between parties dealing at arm's length.

- It may be that, on the facts of a particular situation, the above arguments don't apply, eg. where the employer in fact negotiates carefully on the terms and there is equality in bargaining position with, say, a senior manager. Clients who are unsure of their position would therefore be better off taking advice. You are therefore welcome to contact us for a more detailed opinion on your specific circumstances if required.

ccma progress and developments

by roewayda abrahams

At a recent SASLAW seminar, the Director of the CCMA, Ms Nerine Kahn, spoke on *"One year after assuming office: A reflection by the Director of the CCMA"*.

Ms Kahn's opening remarks regarding the positioning of the CCMA at a strategic level were encouraging. She stated that she has focused on problems at the level of implementation within the CCMA. She referred to the following: the CCMA Johannesburg office move, the departure of the CCMA's National Registrar, whose position is still vacant, the tenth anniversary of the CCMA and the decision in *Rustenburg Platinum Mines* which resulted in the retraining of all Commissioners.

At an internal level, Ms Kahn has dealt with the CCMA's performance, structure and culture. There are issues which still remain critical, such as: the extent of under-funding, the human resources crisis, corporate governance measures which must be addressed, and certain recalcitrant management within the CCMA.

Ms Khan highlighted some of the CCMA's successes of the year, which were measured differently from past years because the CCMA has changed how it is weighting its performance goals. The CCMA's statistics in the periods 2005/6 and 2006/7 are:

1. con/arbs finalised showed an average increase of 12.81%;
2. non-attendance at conciliation decreased by an average of 2.87%;
3. settlement of matters increased by an average of 1.63%;
4. arbitrations which were finalized increased by an average of 8.78%;
5. late awards by Commissioners decreased by an average of 43.75%;
6. postponements increased by an average of 3.66%;
7. the average turnaround time for conciliations improved from an average of 52 days in 2005/6 to 31 days in 2006/7; and

8. the average turnaround time for arbitrations improved from an average of 94 days in 2005/6 to 31 days in 2006/7.

We suggest that in future years the CCMA may measure its performance in a more qualitative way by assessing some of the following aspects of its work:

- the standard of awards of Commissioners which should reflect a rational basis for the Commissioner's decision in view of the information and material before him or her;
- maintaining a proper record of the CCMA proceedings; and
- measuring the number of awards which were successfully reviewed.

Ms Kahn's concluding remarks were that mediation is no longer a cure for disputes at the CCMA, Labour Court applications in terms of section 143 to make arbitration awards orders of court are increasing; and that the loss of skills and low skills base within the CCMA are issues with which she will have to deal in the future.



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keren machanik
associate



thabang ntshembe
associate





Our employment law team offers a wide range of services, including:

- Recruitment and selection disputes and litigation
- Disciplinary issues and disciplinary enquiries
- Incapacity cases (poor performance and ill health)
- Grievance hearings
- Restructuring exercises and retrenchments (private and public sector)
- Section 197 (transfers of businesses)
- Employee fraud and corruption cases working with forensic services
- Mediating and negotiating the resolution of disputes
- All employment law litigation (CCMA, arbitration and Labour Court)
- CCMA reviews
- Industrial action disputes including strikes (legal and illegal), lock outs, go-slows, picketing, overtime bans and works to rule
- Drafting recognition and collective bargaining agreements
- Immigration services including work permits
- Advising foreign employers on employment issues in South Africa
- Drafting employment contracts, letters of appointment and mutual termination agreements
- Drafting employment policies and codes of conduct
- Advising employers on employee benefit issues including pension law issues and disputes
- Managing executive disputes
- Due diligences on employment law issues
- Occupational health and safety accidents and policies
- Advising on the construction regulations (employment and health and safety aspects)
- Preparing contracts for SA employees operating in Africa and elsewhere
- Unfair discrimination disputes including promotion and appointments
- Drafting restraint of trade and confidentiality agreements and dealing with restraint and confidentiality litigation
- Urgent applications on strikes, suspensions etc.
- Privacy issues in employment
- Telecommunication issues in employment (internet / e-mail abuse)
- Harassment cases (sexual and bullying)
- Advising on and interpreting labour statutes, codes of practice and regulations
- Advising clients in fraud / dishonesty cases
- Preparing applications for exemptions / exclusions
- Protected Disclosure disputes and litigation
- Strategic advice on all employment issues
- Remuneration
- Share Option Schemes
- Employment equity compliance
- Employee assistance programs
- HIV/AIDS and employment